

Using Operations and Maintenance Funds in Contingency Operations

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MANY MILITARY LEADERS misunderstand the importance of fiscal law in military operations, particularly the restrictions on the use of operations and maintenance (O&M) funds. Congress uses fiscal constraints to control military operations and foreign policy. Commanders who ignore those funding restrictions risk their careers and, ultimately, may place the operation itself in political jeopardy. Congress or its watchdog agencies (the Comptroller General and the General Accounting Office [GAO]) may seize on a well-intended, but misguided use of military resources to tighten the purse strings on a particular operation or on military funding in general. This article is intended to sensitize leaders to these risks and to suggest ways to reduce both personal and mission exposure.

Constraints in Funding National Security Operations

Congress uses a variety of mechanisms to control expenditures, from very general to highly specific legislation. The general legislation is the basic appropriation process. In a national defense budget totaling hundreds of billions of dollars, Congress cannot provide line-item detail for expenditures. Accordingly, it issues lump-sum appropriations—money placed in broad categories such as procurement, military construction (MILCON) and operations and maintenance. Congress then controls expenditures of those categories through statutes that govern all government expenditures—general fiscal law—or through very specific directions for named agencies or programs. In addition, the GAO scrutinizes agency spending for compliance.

General fiscal law. What has been called the “Purpose Statute” is key to Congress’s control over how federal dollars are spent. Originally enacted in 1809, the statute is a cornerstone of congressional control over the federal purse. It requires that funds be spent only on the objects for which the appro-

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priations were made, and it prohibits reappropriation, transfer and diversion of unexpended funds, unless authorized.¹

For commanders who argue that it is better to seek forgiveness than to ask permission, a set of related statutes known as the *Anti-Deficiency Act (ADA)* may make them think twice. The heart of the *ADA* is just a few lines long: “An officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”²

Unlike most fiscal constraints, the *ADA* has teeth, authorizing mandatory “appropriate” administrative sanctions, fines and imprisonment for knowing and willful violations.³ Aside from the statutory penalties, the military departments require investigation of potential violations, identification of individuals responsible, reports to Congress and sanctions.⁴ The DOD policy requires disciplinary action for anyone found responsible for an *ADA* violation.⁵ While extenuating circumstances will be considered in determining the appropriate penalty, good faith or good intentions will not excuse a violation.

The *Economy Act* is a twist on the transfer prohibitions of the Purpose Statute.⁶ For example, if DOD engages in foreign aid operations that should more properly be performed by the State Department, the result is that DOD has reduced its dollars

available for national defense activities and the State Department budget has been, in effect, augmented. Because the State Department no longer has to spend its resources to accomplish what the DOD did for it, it now has more funds to spend on other programs. The *Economy Act* requires this imbalance to be corrected by compelling the agency receiving the benefit to transfer funds to the agency performing the service. The funds transferred must equal the full value of the services rendered, including indirect costs.

Examining expenditures. Expenditures are evaluated and scrutinized in three aspects: time, purpose and amount. Time refers to the period during which particular funds may be used. Under most circumstances likely to arise during military operations other than war, meeting the time test is not difficult, since operational funds are "Cinderella" dollars; they expire at the end of the fiscal year and are replaced by the new fiscal year's funds. The amount requirement has caused some difficulty, but the purpose restrictions cause most of the headaches. Determining the authorized purposes for which a lump sum appropriation can be spent is far easier said than done.

O&M appropriations are the primary source of funds for most contingency operations and frequently may be the only source of funding available. Military lawyers are taught to analyze expenditures using the following framework:

- Is the expense necessary?
- Is there a more specific appropriation for this purpose?
- Does this expenditure augment accounts?

A necessary expense does not have to be the only way or even the best way to accomplish the agency's mission. The key is whether the expenditure will accomplish the purpose of the appropriation. Thus, funding questions are closely tied to the military's roles and missions as established in *United States Code (USC)*, Title 10, as well as in military custom and experience.

Funding statutes other than O&M play a large role in military operations. Separate accounts are provided for MILCON and procurement. Without specific statutory authorization, O&M funds cannot be expended for construction and procurement, for the more specific appropriation must be used rather than the more general one. This rule applies even if funds in the more specific appropriation have been exhausted.

The augmentation rule is imposed by the Purpose Statute and the *Economy Act*. In determining whether O&M funds can be spent for a particular mission, it is therefore essential to ask: whose mission is this? In combat operations or in operations

approaching combat conditions, congressional or GAO second-guessing of fiscal decisions is less likely. The closer the operation is to combat on the spectrum of conflict, the more flexible the com-

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mander's fiscal options become. The fiscal law principles of necessity and purpose are strongly evident in combat or near-combat operations.

Conversely, in operations designated from the outset as humanitarian and civic assistance (HCA) operations, fiscal law questions are likely to be relatively simple. Fiscal law issues can arise in these operations concerning what should be funded by foreign aid or security assistance dollars and what should be funded by military HCA O&M dollars, but the potential for misspending general O&M funds is reduced. However, when HCA efforts are funded under *USC*, Title 10, Section 401, the military may only engage in activities in five areas: medical, dental, and veterinary care; construction of rudimentary surface transportation systems; well drilling and construction of basic sanitation facilities; rudimentary construction of public facilities; and mine-clearing operations. A military operation must be designated as an HCA mission by the Joint Chiefs of Staff and approved by the Secretary of State to qualify for Section 401 funding.

Peacekeeping and peace-enforcement operations, with their mix of missions, present the most difficult fiscal law issues, especially in coalition environments. Without designation as an HCA mission, these operations cannot use the congressionally appropriated HCA funds. They are likely to be more politically contentious, and, as Congress seeks control over foreign affairs through the purse strings, they are more prone to second-guessing about the lawfulness of expenditures. Mission creep has fiscal as well as operational implications; financially strapped aid programs (government and otherwise) see large groups of soldiers, vehicles and supplies as sources of assistance.

Coalition environments present significant fiscal issues, notably those involving logistic support to nations, organizations and agencies other than US

military forces. The US military takes great pride in its highly trained and well-equipped forces. The level of logistic support, including health and comfort supplies and facilities, exceeds that of most of our potential coalition partners. In contrast, UN-supplied forces often experience difficulties in obtaining basic support, particularly in the early days of a deployment.

Americans are an extraordinarily generous people, and our military forces share that generous

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spirit. Frequently, well-meaning commanders seek to share supplies and equipment, for either humanitarian or operational reasons, with their coalition partners. Unfortunately, their desires cannot always be accommodated.

The general rule is that equipment, supplies and services provided to US forces may not be shared with, loaned or given to any other country or organization. The general rule has many exceptions, but commanders do not have any inherent authority to grant exceptions on their own. Acquisition and cross-servicing agreements (ACSA) are the chief exception.⁷ They permit logistic support to certain countries by a replacement in kind, trade or cash. Major end items may not be provided under ACSA; they are not substitutes for foreign military sales programs. Not all nations are covered by an ACSA, and the list of covered nations changes periodically.

Recent Fiscal-Operational Issues

Both the Haiti and Bosnia missions have generated a variety of fiscal issues. As joint combined operations under UN sponsorship, without significant military HCA funding, they offer many problems in the use of O&M funds. For a trained operational lawyer, the issues are relatively easy to spot. However, coming up with answers that respect fiscal law and permit mission accomplishment can be extraordinarily difficult. As the following examples illustrate, how the mission is framed and documented is crucial to establishing a sound basis for spending US dollars. While the word "operational" is not a magic wand that makes fiscal law

problems disappear, the term "logistic support" is one that is sure to invoke them.

Road building. The Bosnian and Haitian operations each generated fiscal issues involving road building and repairing. At the time of the deployment, Bosnia's paved roads, as well unpaved secondary roads, were extensively pitted from active fighting, land mines and years of neglect. In Haiti, the road network, never very robust by US standards, had also suffered from considerable neglect. The road networks in both countries were essential for resupply, communications and accomplishing military missions to establish safe and secure environments.

To determine the limits on US forces in road repair or reconstruction, several questions had to be answered. First, what is the reason for the roadwork: to enable US forces to do their job or to aid the local population? Roadwork for US forces is operational; building or repairing roads primarily for the host country is foreign assistance. Second, what type of road work is to be done? Is this construction of a new road, upgrading a dirt road to asphalt or patching up holes? New and upgraded roads are classified as construction; repair of existing roads is not. Construction can be funded with O&M dollars, but there is a limit on such funding. If the road work is patching, grading or paving to restore the road to a usable condition or to repair damage US forces have caused, O&M dollars can be used and construction funding caps do not apply. Third, how much will the road work cost? Project splitting is prohibited, but is work on two different roads one project or two? Lumping unrelated work together may result in the construction cap being unnecessarily applied.

While other issues may determine the scope of the project, the purpose determines whether it can be performed at all. Early in the Bosnian deployment, US forces were asked to help build a new two-lane road between Sarajevo and the Muslim enclave of Gorazde. The military annex to the Dayton Peace Accords required the road but as in other annexes, it was silent on who was to pay the bill. Could we assist? After all, the mission to build the road was found in the military annex to the accord, an annex largely drafted by the United States. Command of the military forces in Bosnia rested in a US officer, and the mission was a NATO operation.

The answer was simple, but it was not one the NATO command structure wanted to hear. The road was to be built to aid the civil government and civilian population of Bosnia, not to assist the military forces to accomplish their mission. US and NATO forces could use the existing road, which ran



Civil affairs soldiers of the 10th Mountain Division prepare to cut lumber for refurbishing a Somali community center. Leaders must ensure that operational funds and assets are not used for projects that primarily benefit civilians.

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through Serb-controlled areas. If the Muslims and Croats were afraid to use the existing road, the military could patrol it, but for US forces at least, road construction was out. The military mission to facilitate freedom of movement could be accomplished by other methods than road construction. The US military had to tell NATO it could not assist in the road-construction effort.

Conversely, construction of another new road, albeit shorter and unpaved, within the American sector was approved. One of the larger base camps in the northern sector, Camp McGovern, straddled one of the principal roads used by civilian traffic in the area. Each vehicle using the road to travel through the base camp had to be stopped and searched, and as the economy and political situation gradually improved, more vehicles began transiting the base. The gate and search areas were close to both the camp headquarters and life-support areas. A car bomb at the gate or an uninspected vehicle presented a hazard to American forces. The division determined that a bypass road was necessary for force protection. Although it might appear that the road was constructed to benefit the local freedom of movement, the real reason for its construction was to reduce the hazard to American forces. That the local population no longer had to wait in line to have

their vehicles inspected was incidental to the construction, not the reason for it.

Haitian road construction issues were raised to the JCS level in 1995. Having properly concluded that O&M funds could not be used to lay asphalt and construct drainage along a 1.3-mile stretch of roadway, Atlantic Command sought \$820,000 in HCA CINC initiative funds. Applying the statutory language from USC, Title 10, Section 401, the JCS deputy legal advisor concluded that "rudimentary surface transportation systems" and "rudimentary construction and repair of public facilities" did not include asphaltting a roadway. The opinion suggested that State Department or Agency for International Development (AID) funding or loans and grants from third parties be considered as possible funding sources for the project.⁸

One other aspect of road building and road repair bears mentioning. Damage to roads caused by US forces may be the basis for a claim by a local government or, in the case of private roads, the individual owners.⁹ Maneuver damage claims are handled from separate claims funds, not from the unit O&M accounts. Prompt reporting of damaged roads, followed by equally swift claims investigations, adjudications and payments, may provide needed assistance to the indigenous population,

without engaging in tortured justifications for road repairs with only marginal benefit to US forces. Claims personnel will not, however, pay claims for damage unless US forces are responsible for the damage.

Support to other nations. Another common theme in both Bosnia and Haiti was the issue of supporting other coalition members and UN agencies that were part of the peace effort. The general rule

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that the US logistics system could support only US forces and their mission caused frustration in both operations. Some coalition partners, particularly the UN police monitors in both countries, were poorly sustained. Without US assistance, they were frequently unable to perform their missions, leaving their tasks undone or on the shoulders of other (often US) personnel.

In Bosnia, the International Police Task Force (IPTF), a UN-funded agency tasked with making the various Bosnian police forces more suited for a democracy than a police state, relied heavily on the NATO forces for logistic support. Even during the Stabilization Force (SFOR) portion of the deployment, more than a year after the Dayton Accords were signed, US forces received frequent IPTF requests for fuel, water and food. While billing mechanisms existed to charge the UN for the IPTF logistic support, the documentation and collection process was cumbersome.

US forces in Haiti had similar support requests from the Multinational Force (MNF) in Haiti, to include the International Police Monitors. By message, the JCS provided authority for logistic support to the non-DOD participants.¹⁰ These mechanisms were complex, using the *Foreign Assistance Act's* drawdown authority to provide food, fuel and spare parts support to non-US personnel. Support to US personnel, particularly the International Police Monitors, was authorized through the logistic support contract (LOGCAP) with Brown and Root, but separate accounting was required in order to bill the Department of State under the *Economy Act* for the funds expended.

Legal reviews of requests for logistic support were very fact-dependent, and sometimes the level

of detail provided (or sought) by operational lawyers made the difference between approval and disapproval. For example, a request to supply "connex" containers (portable modular units originally acquired from the UNPROFOR mission) to serve as IPTF offices at local hot spots could have been viewed as logistic support for the UN and denied. When it became clear that US patrols and command and control elements would be occupying the trailers along with the IPTF officers, the request was granted because support to the UN was incidental to supporting US personnel.

Providing influenza vaccine to the Russian brigade illustrates the importance of properly documenting the reasons for the request. Given the political wrangling in trying to negotiate an ACSA with the Russian government, European Command's guidance was that no "excess" US property could be provided to the Russians. The division surgeon carefully documented the medical necessity for vaccinating all soldiers in the division: the expected virulence of the season's virus; the close living and working conditions, which provided ideal conditions for airborne viral transmission; and the concept of "herd" immunity, which considered the rate at which influenza viruses can mutate and spread from an unvaccinated person to a vaccinated one. Additionally, the division operations center provided data on the operational impact of an influenza epidemic in the Russian sector alone on the division's ability to accomplish its military missions of patrolling and weapon storage site inspections. The issue then became one of force protection rather than foreign logistic support.

HCA activities. Another Bosnian vaccine issue, this one involving a support mission directed by the NATO SFOR headquarters, illustrated the difficulty US fiscal laws can cause even in a NATO environment. The World Health Organization requested SFOR's support in distributing a large quantity of polio vaccine across Bosnia. SFOR headquarters in Sarajevo tasked each of the three divisions to transport the vaccine to designated villages throughout the divisions' sectors, but there were too few scheduled missions to the villages to carry the vaccine on a space-available basis. By tasking the Turkish, Nordic-Polish and Russian brigades with the bulk of the vaccine delivery missions, and tasking US troops to assume some of those allied brigades' Dayton enforcement operational missions, the American-led division was able to execute the humanitarian aid mission without violating US law.

Interoperability training and support to the parties' forces in Bosnia. During the transition from a relatively robust US IFOR operation to the



Crafty scouts mark the trail for follow-on elements. Costly maneuver damage also jeopardizes relations with civilians.

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leaner US SFOR presence, our artillery units greatly reduced their fire support capability. In the event of a return to hostilities, artillery support from allied units might have become essential. Under these operational conditions, was a request to authorize US transport of Russian artillery pieces to an established range for gunnery interoperability training a request for logistic support? Again, in the absence of an ACSA with the Russians, logistic support was not permitted.

By preparing a justification for the interoperability training that spelled out why US and Russian personnel needed to understand each other's capabilities, limitations and fire control procedures, it became apparent the training was operationally necessary. This was not a logistic support request by the Russians; it was a request by the division operations staff for the Russians to participate in a gunnery exercise along with American artillerymen to ensure the two groups could properly respond to real-world artillery missions.

The requirement for the former warring factions in Bosnia to place all heavy weapons in storage sites and cantonment areas led to another fiscal issue.

Getting the equipment there was the responsibility of the Serb, Muslim and Croat Bosnian armies. Because of limitations on the maximum weaponry permitted each side, the tanks, artillery pieces and other heavy weapons picked for destruction by the parties were generally the nonoperational ones in their inventories. Lacking heavy-equipment transporters and fuel to run the operational vehicles, the parties' forces found it difficult to comply with the directives to consolidate weapon storage sites and to transport equipment for destruction. They requested aid from NATO—diesel fuel or the use of heavy equipment transporters—to comply.

The ordinary rule is that logistic support cannot be rendered to other nations' forces without an ACSA or some form of security assistance program. However, reasoning that the US mission was one of peace enforcement and reasonably anticipating that destroyed equipment was equipment that could not be used against the IFOR/SFOR mission in the event of a return to hostilities, lawyers advised decision makers that providing fuel or transporters fit the operational mission of US forces. The issue of providing fuel or transporters to consolidate

equipment at fewer weapon storage sites was a closer call. Since one of the primary NATO missions was conducting weapon storage site inspections and inventories to ensure compliance with the Dayton Accords, and since consolidating storage sites eased that job, the support was considered operational. Having fewer weapon storage sites reduced the potential number of targets and sites intelligence personnel needed to monitor. The restrictions placed on this support included ensuring the parties' forces had exhausted their means of transport before US or NATO support would be provided.

Guidelines for Commanders

This discussion is not an exhaustive treatment of all the fiscal law problems arising in the Haitian and Bosnian deployments and represents only a small number of the fiscal issues that actually arose. The commanders involved were able to accomplish their missions without violating fiscal law because they recognized the problems, involved operators and lawyers in the problem-solving effort and contemporaneously documented the reasons for their decisions. For commanders in future contingency operations, the following framework is useful for analyzing fiscal issues:

- What is the overall mission and where does the mission lie on the spectrum of conflict? This articulation should involve a careful analysis of the execute order and the operational plan, including the sources of funding for the mission. If other documents are referenced, they must be examined as well.
- How does this specific mission fit into the overall operation? Does this specific mission match up with the sources of funding available? Does this mission help accomplish the larger mission? When the mission is one with a clear operational (as opposed to training) benefit to US forces, it is more likely to be supported. The more the benefit appears to tip toward the indigenous population or someone

other than US personnel, the less likely it is supportable under O&M funding.

- Is this really a military mission? The more the mission appears to fall in the purview of the State Department, AID or some other government or non-government entity, the less likely it can be properly accomplished without reimbursement. HCA activities are limited; compare proposed activities with those in the DOD directive. If they exceed those in scope, HCA funding is probably necessary.

- Is the support requested operational or logistic? If it appears to be logistic support, are there any factors unique to this environment that could make a difference in how the support is viewed? Is there a contemporaneous, auditable record to support the decision that this is a mission properly executable with O&M funds? Merely stating that the mission is considered one of force protection will not make an HCA mission into an O&M mission. However, explaining the circumstances prevailing in the area of operations at the time and the rationale used to determine that the mission was proper will aid in defending the decision before GAO investigators.

- If the mission is one that cannot be accomplished by US forces with O&M funds, are other funds available? Or is there a method to accomplish the mission without expending O&M funds on it, by trading missions with another nation's forces?

There are few bright spots in the fiscal law applying to contingency operations. The rules are muddy, convoluted, complex and frequently hamper mission accomplishment. Until laws change the way contingency operations are funded, commanders will have to operate in an uncertain environment and, unfortunately, assume an unfair degree of risk when they spend O&M funds on tasks that are not clearly military. Commanders aware of the restricted uses of O&M funds can better protect themselves and their contingency mission. **MR**

NOTES

1. *United States Code (USC)*, Title 31, Section 1301, Money and Finance (1982).

2. *Ibid.*, Section 1341(a)(1)(A) (1982).

3. *Ibid.*, Section 1349(a) (1982). "An officer or employee of the United States Government...violating Section 1341(a)...shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." The criminal penalties are found in 31 USC, Section 1350 (1982) and provide for a maximum sentence of two years confinement and a \$5,000 fine. While there have been no criminal prosecutions for violations, there have been a variety of administrative sanctions imposed against Army personnel who have violated the Anti-Deficiency Act.

4. See DOD Directive 7200.1; DOD 7000.14-R, Financial Management Regulation, Volume 14, Chapter 9, Army Regulation 37-1; or Air Force Regulation 177-16.

5. This policy was set forth in a 19 Dec 1994 memorandum from the Undersecretary of Defense (Comptroller) to the Secretaries of the Military Departments, Subject: Violations of the Anti-Deficiency Act.

6. *USC*, Title 31, Section 1535 (1982).

7. *USCA*, Title 10, Section 2342 (Supplement 1997).

8. Memorandum from OGCJCS/LC to J-7, Subject: Scope of Permissible Road Construction HCA, dated 12 May 1995 (copy on file with the author). The legal adviser noted that although cost was not determinative in HCA funding, the more expensive a project, the less likely it would meet the criteria for being basic or rudimentary.

9. These claims would be considered under the *Foreign Claims Act, USC*, Title 10, Section 2733.

10. MSG 041658Z Nov 94, for Joint Staff to CINCUSACOM, Subject: Support of Non-DOD Multinational Forces in Haiti.

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